A

THETA EDGE BHD v. INFORNENTIAL SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
PRASAD SANDOSHAM ABRAHAM JCA
HASNAH MOHAMMED HASHIM JCA
B ASMABI MOHAMAD JCA
[CIVIL APPEALS NO: W-02(NCVC)(W)-756-05-2015 &
W-02(NCVC)(W)-904-06-2015]
21 FEBRUARY 2017

C ***COMPANY LAW:*** *Winding up – Voluntary winding up – Application for lifting of corporate veil – Claimant obtained judgment against subsidiary company – Whether parent company liable for judgment against subsidiary – Whether parent company conspired to act fraudulently against claimant – Whether claimant deprived from recovering judgment – Companies Act 1965, ss. 255 & 257(1)*

D ***COMPANY LAW:*** *Incorporation of companies – Lifting of corporate veil – Application for – Whether subsidiary and parent company separate entities having separate existence – Whether activities of companies so intertwined that they operated as single commercial entity – Whether evidence of actual or equitable fraud made out to justify piercing of corporate veil*

E

Lityan Systems Sdn Bhd ('Lityan Systems'), a wholly owned subsidiary of the appellant, and the respondent entered into a consultancy agreement wherein the respondent was to provide financial consultancy services to Lityan Systems and its group of companies for a term of three years. However, a year later, the consultancy agreement was terminated. The F parties' attempt to negotiate settlement failed resulting in an action against Lityan Systems by the respondent. The respondent obtained judgment against Lityan Systems ('Lityan judgment') and when the judgment remained unsatisfied, the respondent commenced an action against the appellant and four other defendants in the High Court, seeking a declaration that the G appellant and the other defendants conspired to act fraudulently against the respondent to deprive the respondent from recovering the judgment against Lityan Systems. It was also alleged that the acts and conduct of Lityan Systems were in fact the acts and conduct of the appellant. Under the circumstances, the respondent urged the corporate veil to be lifted against the H appellant and that the appellant ought to be liable to the respondent for the judgment owed by Lityan Systems. At the material time when the Lityan suit was still pending and had not been set down for trial, Lityan Systems was voluntarily wound up pursuant to s. 255 of the Companies Act 1965 ('CA'). Following the winding up, the respondent filed its proof of debt which was I admitted by the liquidator. Despite the fact that Lityan Systems was dissolved, the High Court allowed the respondent's application to proceed against Lityan Systems and granted leave to proceed with the Lityan suit. The High Court subsequently allowed the respondent's claim against the

appellant but dismissed the claim against the other defendants. Hence, the appellant appealed ('Appeal No 756'). On the other hand, the appellant in Appeal No 904 appealed against the first and second respondents against the dismissal of its claim wherein the High Court held that there was fraud committed against the appellant by Theta Edge Berhad but the appellant had failed to prove the elements of conspiracy against the respondents.

Held (allowing Appeal No 756 with costs; dismissing Appeal No 904 with costs)

Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

(1) A company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence. Lityan Systems and the appellant were two distinct commercial entities. It could not be reasonably inferred that the two companies had operated as a single commercial entity. There was the absence of any contemporaneous documents emanating from Lityan Systems to confirm that the activities of the two companies were so intertwined that they had operated as a single commercial entity. (paras 23 & 24)

(2) The corporate veil will be pierced by the court only in appropriate circumstances. The evidence of either actual fraud or conduct amounting to fraud in equity is a non-negotiable prerequisite to justify lifting of the corporate veil. However, there was insufficient evidence of actual or equitable fraud made out by the respondent against the appellant to justify piercing of the corporate veil of the appellant. (paras 29 & 34)

(3) The judgment was entered against a company that was dissolved. However, the judgment was not set aside and neither was there any application made pursuant to s. 307 of the CA. Hence, the judgment obtained remained valid and enforceable. (para 36)

(4) Pertaining to Appeal No 904, the first respondent was acting on behalf of Thetha Edge Bhd, whereas the second respondent was merely discharging his duties and responsibilities as a provisional liquidator. In the tort of conspiracy, there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means, resulting in damage. On the totality of the evidence, there was insufficient evidence of actual or equitable fraud made out. Accordingly, the claim for conspiracy to defraud must necessarily fail. (paras 37 & 38)

(5) Under s. 257(1) of the CA, the duty to lodge a written declaration with regards to the solvency of the company lies with the director of the said company. However, Lityan Systems was wound up by way of a creditor's voluntary winding up pursuant to s. 255 of the CA. No declaration of solvency is required for that purpose. The directors of Lityan Systems had affirmed a statutory declaration in Form 65A to declare that the company could not continue its business. Furthermore, the first respondent was not even a director of Lityan Systems and accordingly, did not breach any statutory duty to the appellant in the winding-up process of Lityan Systems. (paras 39 & 40)

Bahasa Malaysia *Headnotes*

Lityan Systems Sdn Bhd ('Lityan Systems'), sebuah subsidiari milik penuh perayu, dan responden memasuki perjanjian pakar runding di mana responden perlu memberikan perkhidmatan pakar runding kewangan kepada Lityan Systems dan kumpulan syarikatnya bagi tempoh tiga tahun. Walau bagaimanapun, setahun kemudian, perjanjian pakar runding itu ditamatkan. Cubaan pihak-pihak untuk merundingkan penyelesaian gagal menjurus pada tindakan terhadap Lityan Systems oleh responden. Responden memperoleh penghakiman terhadap Lityan Systems ('penghakiman Lityan') dan apabila penghakiman tersebut tidak dipenuhi, responden memulakan tindakan terhadap perayu dan empat defendan lain di Mahkamah Tinggi, memohon deklarasi bahawa perayu dan defendan-defendan lain berkonspirasi untuk bertindak secara fraud terhadap responden bagi menafikan responden mendapatkan semula jumlah penghakiman terhadap Lityan Systems. Juga didakwa bahawa tindakan-tindakan Lityan Systems adalah secara fakta tindakan-tindakan perayu. Berikutan itu, responden mendesak penyingkapan tabir penubuhan syarikat terhadap perayu dan bahawa perayu sepatutnya bertanggungan pada responden bagi jumlah penghakiman yang dihutang oleh Lityan Systems. Pada masa material, apabila guaman Lityan masih kekal dan belum ditetapkan untuk perbicaraan, Lityan Systems digulung secara sukarela menurut s. 255 Akta Syarikat 1965 ('Akta'). Berikutan penggulungan itu, responden memfailkan bukti hutang yang diterima oleh pelikuidasi. Walaupun fakta adalah Lityan Systems telah dibubarkan, Mahkamah Tinggi membenarkan permohonan responden diteruskan terhadap Lityan Systems dan memberikan kebenaran meneruskan dengan guaman Lityan. Mahkamah Tinggi kemudian membenarkan tuntutan responden terhadap perayu tetapi menolak tuntutan terhadap defendan-defendan lain. Oleh itu, perayu merayu ('rayuan No 756'). Sebaliknya, perayu dalam rayuan No 904 merayu terhadap responden-responden pertama dan kedua terhadap penolakan tuntutannya di mana Mahkamah Tinggi memutuskan bahawa Theta Edge Bhd melakukan fraud terhadap perayu tetapi perayu gagal membuktikan elemen konspirasi terhadap responden-responden.

Diputuskan (membenarkan rayuan No 756 dengan kos; menolak rayuan No 904 dengan kos)
Oleh Hasnah Mohammed Hashim HMR menyampaikan penghakiman mahkamah:

(1) Sebuah syarikat adalah entiti berasingan daripada pemegang sahamnya dan sesebuah subsidiari dan syarikat induk atau pemegangan adalah entiti berbeza yang wujud secara berasingan. Lityan Systems dan perayu adalah dua entiti komersial yang berasingan. Tidak boleh semunasabahnya dianggap bahawa dua syarikat tersebut beroperasi sebagai entiti komersial bersama. Tiada dokumen semasa daripada Lityan Systems mengesahkan bahawa aktiviti kedua-dua syarikat begitu saling berkaitan sehingga ia beroperasi sebagai satu entiti komersial bersama.

(2) Tabir penubuhan hanya boleh disingkap oleh mahkamah dalam keadaan yang sesuai. Keterangan sama ada fraud sebenar atau tindakan membentuk fraud dalam ekuiti adalah prasyarat yang tidak boleh dirunding untuk menjustifikasi penyingkapan tabir penubuhan. Walau bagaimanapun, tiada keterangan mencukupi bagi fraud sebenar atau dari segi ekuiti dibuktikan responden terhadap perayu untuk menjustifikasi penyingkapan tabir penubuhan syarikat perayu.

(3) Penghakiman dimasukkan terhadap sebuah syarikat yang telah dibubarkan. Walau bagaimanapun, penghakiman tersebut tidak diketepikan dan juga tiada apa-apa permohonan dibuat berikutan s. 307 Akta. Dengan itu, penghakiman yang diperoleh kekal sah dan boleh dikuatkuasakan.

(4) Berkaitan Rayuan No 904, responden pertama bertindak bagi pihak Thetha Edge Bhd, sementara responden kedua hanya menjalankan tanggungjawab dan kewajipannya sebagai pelikuidasi sementara. Dalam tort konspirasi, perlu ada perjanjian atau 'kombinasi' dua atau lebih orang dengan niat bersama untuk melakukan tujuan tidak sah atau tindakan sah secara yang tidak sah, yang akan mengakibatkan kerugian. Atas keseluruhan keterangan, tiada keterangan yang mencukupi membuktikan fraud sebenar atau dari segi ekuiti. Berikutan itu, tuntutan bagi konspirasi untuk memfraud wajar gagal.

(5) Di bawah s. 257(1) Akta, kewajipan untuk memasukkan deklarasi bertulis berkaitan dengan kesolvenan syarikat terletak pada pengarah syarikat tersebut. Walau bagaimanapun, Lityan Systems telah digulungkan melalui penggulungan sukarela pemiutang menurut s. 255 Akta. Tiada deklarasi kesolvenan diperlukan bagi tujuan tersebut. Pengarah-pengarah Lityan Systems mengikrarkan deklarasi berkanun dalam Borang 65A untuk mengisytiharkan bahawa syarikat tidak boleh meneruskan perniagaannya. Tambahan lagi, responden pertama bukan

pengarah Lityan Systems dan dengan itu, tidak melanggar apa-apa kewajipan statutori terhadap perayu dalam proses penggulungan Lityan Systems.

Case(s) referred to:

Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd [1985] 1 CLJ 255; [1985] CLJ (Rep) 370 HC ***(refd)***

Adams v. Cape Industries Plc [1990] Ch 433 ***(refd)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852 ***(refd)***

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***

Hotel Jayapuri Bhd v. National Union of Hotel Bar and Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Mackt Logistics (M) Sdn Bhd v. Malaysian Airline System Bhd [2014] 5 CLJ 851 CA ***(refd)***

Re Yap JH v. Tan Sri Loh Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 HC ***(refd)***

Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd [2014] 3 CLJ 73 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 255, 257(1), 307(1)

Other source(s) referred to:

Walter Woon, *Company Law*, 2nd edn, p 52

(Civil Appeal No: W-02(NCVC)(W)-756-05-2015)
For the appellant - Harjinder Kaur; M/s Shahrizat Rashid & Lee
For the respondent - Colin Andrew; M/s Goh Wong Pereira

(Civil Appeal No: W-02(NCVC)(W)-904-06-2015)
For the appellant - Colin Andrew Pereira; M/s Goh Wong Pereira
For the 1st respondent - Harjinder Kaur; M/s Shahrizat Rashid & Lee
For the 2nd respondent - Fairuz Zafiran Merican; M/s Farah A Zabir & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-558-05-2012 (overruled in part).]

Reported by S Barathi

JUDGMENT

Hasnah Mohammed Hashim JCA:

Introduction

[1] Before us are two appeals, namely, (W-02(NCVC)(W)-756-05-2015) (Appeal No. 756) and W-02(NCVC)(W)-904-06-2015 (Appeal No. 904) stemming from one judgment of the High Court at Kuala Lumpur. With the consent of respective counsel, both appeals were heard together as they are

based on the same factual matrix and issues. The appellant in Appeal No. 756 appealed against the decision of the learned High Court Judge on 27 April 2015 allowing the respondent's claim with costs of RM15,000 against the appellant. The appellant in Appeal No. 904 appealed against the decision of the learned High Court Judge dismissing its claims against the first and second respondents (second and fifth defendants respectively).

Material Facts

[2] Lityan Systems Sdn Bhd ("Lityan Systems"), a wholly owned subsidiary of the appellant and the respondent entered into a consultancy agreement dated 8 January 2002 ("the consultancy agreement"). Under the said consultancy agreement, the respondent was to provide financial consultancy services to Lityan Systems and its group of companies for a term of three years commencing from 1 January 2002. However, the consultancy agreement was terminated by Lityan Systems on 1 January 2003. The respondent and Lityan Systems attempted to negotiate a settlement but failed to reach any agreement to settle. As a result, the respondent commenced an action against Lityan Systems in the Kuala Lumpur High Court *vide* Civil Suit No. S1-22-1665-2004 ("the Lityan's suit").

[3] The respondent obtained judgment against Lityan Systems on 12 May 2011 ("Lityan's judgment"). As the Lityan's judgment remained unsatisfied, the respondent then commenced an action against the appellant and four other defendants ("the other defendants") in the High Court of Malaya in Kuala Lumpur *vide* Civil Suit No: 22NCVC-558-05-2012. In the action in the High Court, the respondent sought a declaration that the appellants and the other defendants conspired to act fraudulently against the respondent to deprive the respondent from recovering the judgment against Lityan Systems. It was alleged by the respondent that the acts and conduct of Lityan Systems were in fact the acts and conduct of the appellant. Under the circumstances the respondent contended that the corporate veil ought to be lifted against the appellant and the appellant ought to be liable to the respondent for the judgment debt owed by Lityan Systems under Lityan's judgment. The respondent claimed damages in the sum of of RM2,105,585.23 (being the amount outstanding under Lityan's judgment), aggravated and or exemplary damages and interest.

[4] Lityan Systems was voluntarily wound up on 18 August 2010 pursuant to s. 255 of the Companies Act 1965 (CA). At the material time the Lityan's suit was still pending and had not been set down for trial.

[5] Following the winding-up of Lityan Systems, the respondent filed its proof of debt ("POD") on 26 October 2011. The POD was admitted by the liquidator. Despite having filed the POD, the respondent proceeded to seek leave of the High Court to proceed with Lityan's suit *vide* a summons in chambers dated 25 February 2011. Lityan Systems was subsequently dissolved by the High Court on 4 April 2011.

[6] Despite the fact that Lityan Systems was dissolved on 4 April 2011 the High Court allowed the respondent's application to proceed against Lityan Systems and granted leave to proceed with the Lityan's suit.

[7] On 27 April 2015 the learned High Court Judge allowed the respondent's claim with costs against the appellant and dismissed the respondent's claims against the other defendants.

[8] Dissatisfied with the High Court judgment in allowing the respondent's claim against the appellant, the appellant lodged this appeal.

Findings Of The High Court

[9] The learned High Court Judge allowed the respondent's claim against the appellant on the following basis:

(a) the corporate veil of the appellant ought to be lifted as the appellant and Lityan Systems had acted as a single commercial entity and as one concern;

(b) the appellant controlled the movement of its subsidiaries which included Lityan Systems;

(c) the potential liability of the appellant to the respondent in respect of the dispute between Lityan Systems and the respondent as well as the proposed settlement in relation to the said dispute was discussed in the appellant's board of directors' meetings thus evidencing that the appellant and Lityan Systems operated as a single commercial entity;

(d) the fact that the appellant and Lityan Systems were treated as a single entity was also evident in the preparation of the appellant's accounts and management structure;

(e) the appellant recognised the Lityan's suit as its possible obligation in the consolidated annual reports and financial statements of the appellant;

(f) the appellant through its managing director negotiated a settlement with the respondent in relation to the debt owing by Lityan Systems and thus, evidencing that the appellant and Lityan Systems operated as one single entity;

(g) the appellant was in complete control of the Lityan system and the termination of the consultancy agreement between the respondent and Lityan Systems was as at the direction of the appellant;

(h) the corporate veil of the appellant ought to be lifted on the basis that the appellant had acted fraudulently to wind up Lityan Systems to deprive the respondent of the proceeds of any judgment that the respondent would have obtained against Lityan Systems;

(i) the appointment of the third and fourth defendants as directors of Lityan Systems was for the sole purpose of winding-up Lityan Systems and to carry out the instructions of the appellant to wind up Lityan Systems;

(j) the intention in winding up Lityan Systems under s. 255 CA was to ensure that the Lityan suit will not proceed further;

(k) the question whether counsel for the respondent had misrepresented to the High Court on the status of Lityan Systems in that it had been dissolved at the hearing of the respondent's application for leave to proceed with the Lityan suit or at the time when the Lityan's judgment was obtained is a non issue; and

(l) the question whether the filing of the proof of debt by the respondent extinguished the respondent's claim against Lityan Systems as the Lityan's judgment was not set aside is a non-issue.

Issues Raised By The Appellant

[10] Learned counsel for the appellant raised three main issues in this appeal:

(i) the appellant and Lityan Systems did not operate as a single entity;

(ii) the learned High Court Judge erred on facts and in law in lifting the corporate veil of the appellant on the basis of fraud when the respondent failed to specifically plead the particulars of fraud and also failed to prove any allegation of fraud against the appellant. The learned High Court Judge erred on facts and in law in holding that the winding-up Lityan Systems was in fact engineered by the appellant to deprive the respondent of the Lityan judgment; and

(iii) the Lityan judgment was obtained by the respondent against a non-existing entity.

The Appellant's Submission

[11] Learned counsel for the appellant submitted that even though the consultancy agreement was entered between Lityan Systems and the respondent to provide consultancy services to the Lityan group of companies, it does not necessarily mean that the appellant and Lityan system operated as a single entity. The managing director of the appellant did not deny that the meeting held on 18 April 2008 was to discuss the settlement of the respondent's claim. However, the attempt to settle or negotiate on behalf of Lityan Systems does not necessarily mean that Lityan Systems and the appellant operated as a single entity.

[12] It was also argued that if at all it should have been the corporate veil of Lityan Systems that ought to be lifted and not that of the appellant. Furthermore, in its pleading, the respondent did not particularise the fraud but had merely stated that the voluntarily winding up of Lityan system was to fraudulently deprive the respondent of the Lityan judgment.

[13] In his submission, learned counsel for the appellant highlighted that the respondent during the trial at the High Court appeared to have abandoned the issue of fraud. The only evidence led in the High Court to justify the

lifting of the corporate veil was in respect of the appellant and Lityan Systems operating as a single commercial entity. Learned counsel for the appellant further submitted that the High Court Judge had misdirected herself on this issue and failed to appreciate that the respondent did not raise fraud in its pleadings.

[14] It was further submitted by learned counsel for the appellant that the respondent failed to name Lityan Systems as a party to the present action and also failed to specifically plead that the corporate veil of Lityan Systems ought to be lifted.

[15] Learned counsel for the appellant argued that the Lityan judgment was obtained by the respondent against a non-existing entity as Lityan Systems was dissolved on 4 April 2011. Despite the fact that Lityan Systems was dissolved the High Court had allowed the respondent's application for leave to proceed against Lityan Systems on 7 April 2011 and subsequently judgment was entered on 12 May 2011.

[16] Since Lityan Systems was dissolved on 4 April 2011 the respondent cannot file an action against it. The dissolution of Lityan Systems would in effect means that it no longer possessed any legal personality and status to sue and be sued. Lityan Systems therefore cannot file any action. Neither can it be sued.

[17] The appellant submitted that the respondent should have instead applied for a declaration that the dissolution of Lityan Systems was void and to reinstate it to its former status before initiating an action against the appellant pursuant to s. 307(1) CA. The failure of the respondent to make such an application is therefore fatal as the judgment obtained was against a non- existing entity.

The Respondent's Submission

[18] Learned counsel for the respondent submitted that the corporate veil may be lifted whenever the interest of justice requires. There is no requirement to establish fraud. Furthermore, the High Court had found that there was ample evidence to show that the appellant could control every movement of its subsidiaries including Lityan Systems. The potential liability of the appellant was discussed at the board of the appellant which had resulted in the preparation of the proposed settlement by the appellant. As no witness was called by the appellant to contradict PW1's testimony that the appellant and Lityan Systems operated as a single entity, his evidence remained unchallenged.

Our Decision

Whether Lityan Systems And The Appellant Operated As A Single Entity

[19] The respondent had initiated the action against the appellant and the four other defendants premised on the allegation that they had conspired to act fraudulently against the respondent by voluntarily winding up Lityan

Systems. The respondent contended that since the appellant was the alter ego and the directing will and mind of Lityan Systems the corporate veil of the appellant ought to be lifted so that they could be held liable for the judgment sum. It was argued by the respondent that the winding up of Lityan Systems was crafted by the appellant to avoid payments to creditors thus depriving the respondent of the judgment sum.

[20] The learned High Court Judge found that there was sufficient evidence to show that the appellant had controlled the activities of its subsidiaries which included Lityan Systems. PW1, a director and shareholder of both Lityan Systems and the appellant, was familiar with the affairs of both Lityan Systems and that of the appellant. In his testimony, he had confirmed that Lityan Systems and the appellant had operated as a single entity.

[21] The only witness for the appellant was Nor Badli Munawir bin Mohamad Alias Lafti (DW1) who was a director of the appellant and had signed the resolution to wind up Lityan Systems. He told the court that as the Managing Director of the appellant, he had the authority to negotiate settlement with the respondent.

[22] Her Ladyship had relied wholly on the oral evidence of PW1 to come to the conclusion that the appellant and Lityan Systems had operated as a single company since the evidence of PW1 went unchallenged. Furthermore, the potential liability of the appellant with regards to Lityan Systems' debts were discussed many times at the appellant's board meetings. She was of the considered view that the appellant and Lityan Systems were in fact a single commercial entity because the reports and financial statement of the appellant had acknowledged the claim of the respondent. The learned High Court Judge was of the considered view that since the managing director of the appellant was willing to meet PW1 to negotiate a settlement in respect of the debt owing, it is evident that the two companies operated as one single entity.

[23] A company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence. In *Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd* [1985] 1 CLJ 255; [1985] CLJ (Rep) 370; [1985] 2 MLJ 165, the court held that an incorporated company was a legal person separate and distinct from the shareholders of the company. Shankar J had this to say:

> It is trite law that an incorporated company is a legal person separate and distinct from the shareholders of the company. The company from the date of incorporation has perpetual succession and the Companies Act provides that the liability on the part of the shareholders to contribute to the assets of the company will be limited in the manner provided by law and its memorandum and articles of association. The whole point of forming a limited company is that the shareholders can have in their hands the management of the business without incurring the risk of being under unlimited liability for the debts of the company.

[24] In the appeal before us, Lityan Systems and the appellant are two distinct commercial entities. We are not persuaded that it could be reasonably inferred that the two companies had operated as a single commercial entity even though PW1's evidence was not rebutted or challenged. There was the absence of any contemporaneous documents emanating from Lityan Systems to confirm that the activities of the two companies were so intertwined that they had operated as a single commercial entity. It appeared to us, based on the facts and the evidence, the learned judge had, with respect, erred in accepting in its entirety the evidence of PW1.

Lifting Of The Corporate Veil

[25] Her Ladyship considered and applied the case of *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council* [1976] 1 WLR 852 where Lord Denning the Master of the Rolls said:

> Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in *Harold Holdworth & Co (Wakefield) Ltd v. Caddies* [1955] 1 All ER 725]. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

[26] The learned High Court Judge concluded that the appellant had acted fraudulently to wind up Lityan Systems to deprive the respondent of the proceeds of the judgment it had obtained against Lityan Systems. Therefore, it was not wrong in law to pierce the corporate veil of the appellant.

[27] Walter Woon in his book "*Company Law*" 2nd edn at p. 52, stated that:

> The only justification for lifting the veil of incorporation is that the company is in fact not a separate entity. This requires evidence. If the evidence does not establish that the company is run as a mere extension of its controllers' affair, the veil of incorporation should remain firmly in

place. However, if it can be proven that the company is in fact not a separate entity from its controllers, a court might be persuaded to lift the veil in the appropriate circumstances.

[28] The Supreme Court in *Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 held:

... the court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved although the consequences of lifting the veil would vary according to the circumstances of each case.

[29] The corporate veil will be pierced by the court only in appropriate circumstances. In the case of *Hotel Jayapuri Bhd v. National Union of Hotel Bar and Restaurant Workers & Anor* [1979] 1 LNS 32 HC, the court lifted the veil of incorporation on the facts of that case because it concerned the Industrial Relations Act 1967 where the Industrial Court was required to disregard technicalities and to take into account the rules of equity, good conscience and the merits of the case.

[30] Justice Abdul Malik Ishak (JCA) in the case of *Mackt Logistics (M) Sdn Bhd v. Malaysian Airline System Bhd* [2014] 5 CLJ 851 in his judgment succinctly explained:

Once a company is incorporated, a veil is cast over the true controllers of the company, through which the law will not usually penetrate. There was no standard principle to guide the courts in piercing the corporate veil. However, there are statutory as well as common law exceptions to the principle enunciated in *Salomon v. Salomon & Co*, and once a case comes within one of the exceptions, the courts may lift the veil of incorporation. In piercing the corporate veil, the facts of the case must be examined and it must be clearly pleaded that the veil should be lifted.

[31] Gopal Sri Ram JCA (later FCJ) in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355, CA, aptly said at p. 362:

In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc* [1990] Ch 433, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity.

[32] In *Law Kam Loy*'s case, His Lordship discussed at length the DHN's case and was of the view that in light of the authorities such as *Adams v. Cape Industries Plc* [1990] Ch 433, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. There must be evidence of either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity.

[33] In the Federal Court decision of *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719 it was held:

> [96] But in the event that we should, we are of the view that it is now a settled law in Malaysia that the court would lift the corporate veil of a corporation if such corporation was set up for fraudulent purposes, or where it was established to avoid an existing obligation or even to prevent the abuse of a corporate legal personality.
>
> [97] As to what constitutes fraudulent purposes, it has been described as to include actual fraud or fraud in equity. And fraud in equity occurred in '... cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies ...'

[34] Apart from the subsequent oral evidence of PW1, there was no other cogent evidence to support the application of the doctrine. The evidence either of actual fraud or conduct amounting to fraud in equity is a non-negotiable prerequisite to justify lifting of the corporate veil. Having said that we have directed our minds to the case in its entirety and found that there was insufficient evidence of actual or equitable fraud made out by the respondent against the appellant. We have not been convincingly persuaded that there is any justification to pierce the corporate veil of the appellant. The Federal Court in *Solid Investments Ltd v. Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 CLJ at p. 73 held:

> (2) The Appellant and Respondent were not in a fiduciary relationship and there was no fiduciary duty to account. There was no relationship of trust and confidence between the parties. The trial court erred in lifting the Respondent's corporate veil to find that the Respondent was bound by the consultancy agreements and liable to account to the Appellant. There had to be evidence either of actual fraud or some conduct amounting to fraud in equity to justify the lifting of the corporate veil. (paras 45, 46, 48 & 49).

[35] Based on the reasons mentioned above, we are of the view that the learned judge had misdirected herself on the principle of law pertaining to the lifting of the corporate veil.

Existing Entity

[36] We agree with learned counsel for the appellant that the judgment was entered against a company that was dissolved. However, since the judgment was not set aside neither was there any application made pursuant to s. 307 CA, the judgment obtained remains valid and enforceable.

Appeal No. 904

Conspiracy

[37] The learned High Court Judge had concluded that there was fraud committed against the appellant by the first defendant. However, on the issue of conspiracy, Her Ladyship was of the considered view that the appellant failed to prove the elements of conspiracy against the respondents (*Re Yap JH v. Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243). In the tort of conspiracy, there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means, resulting in damage. The first respondent was acting on behalf of Thetha Edge Berhad whereas the second respondent was merely discharging his duties and responsibilities as provisional liquidator.

[38] As we have stated above in Appeal No. 756, on the totality of the evidence, there was insufficient evidence of actual or equitable fraud made out. Accordingly, the claim for conspiracy to defraud must necessarily fail.

Section 257 CA

[39] It is the appellant's submission that the first respondent failed to lodge a declaration of solvency as set out as Form 66 in the CA. Section 257(1) CA stipulates:

> Where it is proposed to wind up a company voluntarily, the directors of the company, or in the case of a company having more than two directors, the majority of the directors may, before the date on which the notices of the meeting at which the resolution for the winding up of the company is to be proposed are sent out, make a written declaration to the effect that they have made an inquiry into the affairs of the company, and that at a meeting of directors have formed the opinion that the company will be able to pay its debts in full within a period not exceeding twelve months after the commencement of the winding up.

[40] Under the aforesaid section, the duty to lodge a written declaration with regards to the solvency of the company lies with the director of the said company. Normally in a voluntary winding up of a company, the declaration of solvency would have been lodged pursuant to s. 257 CA. However, Lityan Systems was wound up by way of a creditor's voluntary winding up pursuant to s. 255 CA. No declaration of solvency is required for that purpose. The directors of Lityan Systems had affirmed a statutory declaration in form 65A dated 20 July 2010 to declare that the company could not continue its business. Furthermore, the first respondent is not even a director of Lityan Systems. Accordingly, we of the considered view that the first respondent did not breach any statutory duty to the appellant in the winding up process of Lityan Systems.

[41] By an ordinary resolution, the second respondent was appointed as the provisional liquidator of Lityan Systems. As the provisional liquidator, the second respondent issued a notice of a meeting to the creditors including the appellant calling for a meeting of the creditors. On the date of the meeting, only seven out of twenty-two creditors attended and voted for the winding up of Lityan Systems. Lityan Systems owed a total sum of RM27,719,113.92 to the creditors who attended the meeting. Based on the evidence both oral and documentary, the second respondent had complied with the provision of the CA in the conduct and administration of the creditor's voluntary winding up of Lityan Systems.

Conclusion

[42] For the reasons mentioned above, we allow the appeal in Appeal No. 756 with costs and set aside the learned judge's decision. We dismiss the appeal in Appeal No. 904 with costs to the respondents. We award costs of RM15,000 to the appellant in Appeal No.756 subject to payment of allocator. In Appeal No. 904, we award costs of RM15,000 each to the first and second respondents subject to payment of allocatur. The deposits of each appeal to be refunded to the respective appellants.